

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

ETHAN ANDREWS ADAMSON,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES
DEPARTMENT OF ANIMAL CARE
AND CONTROL,

Defendant and Respondent.

B278803

(Los Angeles County
Super. Ct. No. BS156279)

**ORDER MODIFYING OPINION;
DENYING REQUEST FOR
JUDICIAL NOTICE; AND DENYING
PETITION FOR REHEARING;
[NO CHANGE IN JUDGMENT]**

The opinion filed March 6, 2019, and not certified for publication, is modified as follows:

1. On page 18, in heading D, the word “*Unsigned*” is deleted and the word “*Unverified*” is inserted.

Heading D as modified reads: *The Hearing Officer Should Not Have Considered the Smiths’ Unverified Statements*

2. On page 19, line 10, after the citations ending with “considered[.]”)” insert as footnote 8 the following:

⁸ Although the Adamsons did not raise this issue until their reply brief, we address it to guide further proceedings. (See *Mateel Environmental Justice Foundation v. Office of Environmental Health Hazard Assessment* (2018) 24 Cal.App.5th 220, 241 [Court of Appeal has “discretion to consider issues first raised in a reply brief”].)

This order does not change the judgment. Respondent’s request for judicial notice is denied and respondent’s petition for rehearing is denied.

PERLUSS, P. J.

ZELON, J.

SEGAL, J.

Filed 3/6/19 Adamson v. County of L.A. Dept. of Animal Care & Control CA2/7
(unmodified opinion)

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B278803

(Los Angeles County
Super. Ct. No. BS156279)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Mary H. Strobel, Judge. Reversed and
remanded with directions.

The Treadway Law Firm, Arran S. Treadway; Law Offices
of Steven L. Martin and Steven L. Martin for Plaintiff and
Appellant.

Mary C. Wickham, County Counsel, Jennifer A.D. Lehman,
Assistant County Counsel, and Diane C. Reagan, Principal
Deputy County Counsel, for Defendant and Respondent.

INTRODUCTION

After Ethan Adamson's dog Venice attacked and injured Michael and Shannon Smith, an administrative hearing officer found Venice was a vicious dog within the meaning of a Los Angeles County Code ordinance and ordered Venice destroyed. Adamson filed a petition for writ of administrative mandate arguing, among other things, the vicious dog ordinance did not apply because the Smiths were trespassing on premises occupied by Venice's owner or custodian, which is an exception to the vicious dog ordinance. The superior court ultimately denied the petition, ruling substantial evidence supported the hearing officer's findings that the trespassing exception did not apply and that Venice was a vicious dog. We reverse and remand with directions for the trial court to remand the matter to the administrative hearing officer for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Venice and Max Attack the Smiths*

Late one afternoon in May 2015, Michael Smith and his wife, Shannon Smith, were walking on a street called Wildwood Canyon Road. Wildwood Canyon Road is a gated street, approximately one mile long, used by residents of six homes located on private property inside the gate. The Smiths were on the road to "inquire about the neighborhood."

As the couple walked past a horse stable, Max, a seven-month-old American Staffordshire mix, and Harley, a Labrador Retriever, ran toward the Smiths from the property at 23485 Wildwood Canyon Road. Max, barking and lunging aggressively,

bit Shannon on the legs multiple times. Harley did not participate in the attack. As Michael stepped between Max and Shannon to keep the dog away from his wife, the Smiths yelled for help. The location, however, was remote, and no one heard them.

Meanwhile, a third dog, a four-year-old brown pit bull mix named Venice, jumped over or through a two-foot fence surrounding the same property on Wildwood Canyon Road. Venice charged at Michael and repeatedly bit his legs while Michael tried to defend himself with a stick. As Michael and Shannon screamed for help and tried to escape, Venice and Max continued to bite them, with Venice acting as the primary aggressor and inflicting most of the injuries.¹

The attack lasted 10 minutes, during which Michael and Shannon walked backward, retreating down Wildwood Canyon Road, hoping the dogs would eventually relent and return to their home. The dogs continued to follow and attack them. Eventually, the Smiths came to a house, where Shannon ran to the door and knocked loudly, but no one answered. When she turned back to Michael, she saw Venice and Max trying to bring him to the ground. She feared they were trying to kill him.

Shannon yelled for Michael to follow her over a wall on the property, and he did, but because the wall did not completely surround the property, the dogs were able to follow them. The Smiths climbed on top of a covered whirlpool, then onto the roof of the house. They were able to get into the house through a sliding glass door on a second-floor balcony.

¹ Max has a prominent underbite, which may have decreased the severity of his bites.

The owners of the house, John and Janice Hoskinson, came upstairs and helped the couple by talking to the 911 operator, elevating Michael's legs, and providing clean water and towels. After continuing to circle the property, the dogs eventually left. When paramedics and sheriff deputies arrived, they could still hear the dogs barking down the road. John Hoskinson later found a trail of blood leading to his house.

Michael's injuries were severe. The dogs had mauled his legs, right arm, back, and torso. Doctors performed a four-hour surgery that same day to repair the muscle lacerations on his lower legs and right arm.

B. *The Department of Animal Care and Control
Impounds Venice and Max*

Animal Control Officer Paul Maradiaga of the Department of Animal Care and Control arrived and spoke briefly with the paramedic. He learned that several dogs were roaming freely on the properties inside the gate, that possibly three dogs had attacked the Smiths, and that deputies were trying to capture those dogs on a nearby property.

When Officer Maradiaga arrived at 23485 Wildwood Canyon Road, he found Venice, Max, and Harley in an agitated state. Unable to round them up, he contacted dispatch to get information about their owner. Eventually, the owners of the property, Marsha and Todd Adamson, arrived. Officer Maradiaga learned that the Adamsons operated an equestrian business on the property, that their adult son Ethan owned Venice, and that their adult daughter Carrie owned Max. After the Adamsons secured the dogs, Marsha admitted the family

allowed the dogs to go off their property, but she maintained the area was private and not open to the public.

Officer Maradiaga ultimately concluded he had to impound the dogs because they were acting aggressively, he could not contain them, and the Smiths had suffered severe injuries. He later obtained statements from the Smiths and photographed their injuries at the hospital. He also interviewed John Hoskinson.

C. An Animal Control Hearing Officer Rules Venice Is a Vicious Dog and Orders Him Destroyed

The Department filed an administrative petition seeking to have Venice declared a vicious dog under Los Angeles County Code section 10.37.030 and ordered destroyed.² Ethan requested an expedited hearing. The hearing officer was a lieutenant who had worked 33 years with Orange County Animal Care and had experience with its vicious dog program. He advised the parties he would determine, “based on preponderance of the evidence,” whether Venice was a vicious dog under the Los Angeles County Code.

Officer Maradiaga described how he captured the dogs and obtained the victims’ statements. When asked how the Smiths came to be walking on Wildwood Canyon Road, he stated the Smiths told him they drove their car through an open gate, parked, and proceeded to explore the neighborhood. However, he did not recall seeing the Smiths’ car.

² The Department also sought to have Max declared a vicious dog. The hearing officer ultimately determined Max was vicious and sent him home with restrictions. The hearing officer’s determination regarding Max is not at issue in this appeal.

Animal Control Officer Kim Schumann stated Venice was the primary aggressor and had inflicted most of the bites on the Smiths. He also described the surgery on Michael Smith's legs and right arm, which required irrigation and debridement (removal of damaged tissue) down to the muscle level and removal of some of Michael's calf muscle to cover the damage. Another officer read the Smiths' statements into the record.

Carrie stated that she found Venice on Venice Beach and that the dog became Ethan's companion after Ethan became sober. She acknowledged that the dogs were out of line and that no one should have to go through what the Smiths experienced. She asserted, however, that this was an isolated incident, that she had spoken to a trainer about providing the dogs with extensive training, and that the dogs would be leashed, muzzled, and watched closely if allowed to return home. She also insisted that the gate on Wildwood Canyon Road had been "very much closed" before the incident, that "[w]hen it's open we all get alerted that the gate is broken because it's unusual," and that Michael and Shannon Smith had parked outside the gate and walked in. She said that, when she spoke with Michael after the incident, he told her the couple had parked outside the gate and walked in, even though the gate was closed, to visit the area where his old college roommate lived.³ She also said that Shannon told her the dogs initially did not charge, but merely circled the couple while growling, and that Max only attacked when Shannon backed into him.

Carrie also testified that Wildwood Canyon Road was "all privately owned," maintained by an unofficial association of the

³ Carrie testified that Ethan had known Michael Smith for years because he was a friend of Michael's daughter.

residents of the houses along the road, and marked “the whole way up” with “no trespassing” signs “because no one wants anybody on their property back here unless you’re invited.” She described the portion of the road that lay on the Adamsons’ property as an easement and stated the only people with “permission to walk on this road where it’s on our property are the two homes that live behind us.”

Carrie stated she believed the attack occurred only over a couple hundred yards of the road, and not, as the Smiths claimed, over half a mile. Regarding the equestrian center, she explained that the family boarded 40 to 50 horses, 15 of which belonged to the Adamsons, and that, to access the equestrian center, members of the public had to call ahead to get the gate code, although she admitted delivery persons and other guests often used the road. She also stated the Adamsons used the equestrian center as a summer camp for young children. She said Venice and Max had always been very friendly to people.

When the hearing officer stated that what troubled him most about the attack was that the dogs were “wrapped up in frenzies” and kept coming after the Smiths, Carrie said the dogs probably behaved that way because Michael was fighting them off with the stick. She also believed Venice charged Michael because Michael had attacked Max, whom Carrie described as Venice’s “little brother.”

Ethan testified that he took the dogs everywhere and that they never growled or became angry. Marsha stated that she had multiple letters of support from people who knew Ethan and the dogs and that the family would control Max and Venice to prevent any further incidents. She also reiterated the Smiths were trespassing. When the hearing officer said he thought the

Smiths were on the road and were never on the Adamsons' property, Marsha and Carrie insisted that the Smiths were on the Adamsons' property, which Marsha and Carrie referred to as "the ranch property," that the road was "a private easement on" the ranch property, and that the ranch property "goes on both sides of the road." Marsha stated the "communal road that goes through, we own that road and both sides of that road. So until they crossed over to [the Hoskinsons'] property, they were never off of our property, you know." She also said, "[I]t's all a hundred percent our property that they were on. . . . They were on our ranch."

At the conclusion of the hearing, the hearing officer expressed his concern that Venice, despite having been neutered, was extremely aggressive. The officer found that Venice was a vicious dog and that releasing him would create a significant threat to public health, safety, and welfare. He therefore ordered Venice destroyed.

D. *The Superior Court Denies Ethan's Petition for Writ of Administrative Mandate*

Ethan filed a petition for writ of administrative mandate in the superior court, claiming the hearing officer was biased. He also invoked an exception to the vicious dog ordinance that applies when a dog injures people who are willfully trespassing on premises occupied by the dog's owner or custodian. Ethan requested a stay of the order of destruction pending the outcome of the mandamus proceeding, which the court granted. The court ruled the hearing officer was not biased, but remanded the matter pursuant to *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 for the hearing officer

to make a factual determination whether the Smiths, at the time they sustained their injuries, “were willfully trespassing ‘upon premises occupied’ by” the Adamsons.

On remand the hearing officer, without hearing any additional evidence, found the Smiths were not willfully trespassing when they sustained their injuries. Regarding this finding, the hearing officer stated that “the road being designated as private relates to who bears responsibility for maintenance of the road” and that “the public does have the right to travel on private ways.” The hearing officer also found the Smiths did not sustain their injuries while on property the Adamsons occupied. Concerning this finding, the hearing officer stated the “dogs came off [the Adamsons’] property and attacked and bit the Smiths on Wildwood Canyon [Road].”

Back in the superior court, Ethan moved to augment the record to include photographs showing “Private Property” and “No Trespassing” signs along Wildwood Canyon Road leading up to the Adamsons’ property, as well as parcel maps of Wildwood Canyon Road. The court denied the motion, along with Ethan’s alternative request to take judicial notice of the maps and photographs, because Ethan did not submit this material until after the hearing officer made his supplemental findings on whether the Smiths had trespassed. The court found Ethan had not exercised reasonable diligence under Code of Civil Procedure section 1094.5, subdivision (e),⁴ because, although Ethan raised

⁴ Code of Civil Procedure section 1094.5, subdivision (e), provides: “Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment . . . remanding the case to be

the issue of trespass at the administrative hearing, he did not submit the maps, argue they were relevant, or seek additional time to obtain them. The court also observed that Carrie had shown the photographs to the hearing officer on an electronic tablet during the hearing, but that Ethan did not seek to include them in the administrative record.

On the merits, the court found substantial evidence supported the hearing officer's findings that Venice was a vicious dog and that the Smiths did not sustain their injuries while trespassing on property occupied by the Adamsons. Relying on a dictionary definition, the court ruled that "occupy" meant "to reside in as an owner or tenant" and did not include "a communal road that is frequently used by neighbors and their guests, as well as other members of the public who are invited into the gated community."

Ethan timely appealed from the ensuing judgment. This court granted Ethan's petition for writ of supersedeas and stayed enforcement of the administrative order to destroy Venice pending the outcome of this appeal.

DISCUSSION

A. *Standard of Review*

"The question presented by a petition for writ of administrative mandate is whether the agency or tribunal that issued the decision being challenged 'proceeded without, or in

reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case."

excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.’ [Citation.] ‘Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.’” (*Doe v. University of Southern California* (2018) 28 Cal.App.5th 26, 34; see Code Civ. Proc., § 1094.5, subd. (b).)

“On appeal from the judgment on a petition for writ of administrative mandate in a case not involving fundamental vested rights,^[5] . . . we review the agency’s findings, not the superior court’s decision, for substantial evidence.” (*Doe v. University of Southern California, supra*, 28 Cal.App.5th at p. 34; accord, *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 239, 240; see Code Civ. Proc., § 1094.5, subd. (c) [“abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record”]; *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1072 [“The scope of our review from a judgment on a petition for writ of mandate is the same as that of the trial court.’ [Citation.] ‘An appellate court in a case not involving a fundamental vested right reviews the agency’s decision, rather than the trial court’s decision, applying the same standard of review applicable in the trial court.’”].) “‘Substantial evidence’ is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584.)

⁵ Neither party argues or cites any case suggesting the decision in this case affects a vested fundamental right.

B. *The Vicious Dog Ordinance*

At the time of the hearing, Chapter 10.37 of the Los Angeles County Code “set forth the procedures by which a dog is found to be a potentially dangerous dog or a vicious dog.” (L.A. County Code, § 10.37.010.)⁶ Section 10.37.030, subdivision (B), defined a vicious dog as “[a] dog which, when unprovoked, in an aggressive manner, inflicts severe injury on or kills a person.”

Where, as here, an animal control officer has “investigated and determined that there is probable cause that a dog is potentially dangerous or vicious,” the Department may petition “for an administrative hearing, to determine whether or not the dog in question should be declared potentially dangerous or vicious.” (§ 10.37.110, subd. (A).) The hearing is “conducted by a neutral hearing officer,” who may be an employee of the Department (as long as the employee is not the same person who seized or impounded the dog or someone junior to that person) or someone outside the Department. (§ 10.37.110, subd. (D).) The hearing officer “may find, upon a preponderance of the evidence, that the dog is potentially dangerous or vicious” and may “make other orders or findings required or authorized by this chapter.” (§ 10.37.110, subd. (C).) If the hearing officer determines that the dog is vicious and that “the release of the dog would create a significant threat to the public health, safety, or welfare,” the Department may destroy the dog. (§ 10.37.140, subd. (A).)

Ethan does not dispute Venice inflicted severe injuries on the Smiths. Rather, he invokes an exception in the vicious dog ordinance that provided “[n]o dog may be declared potentially dangerous or vicious if . . . [the] injury or damage is sustained by

⁶ Undesignated section references are to the Los Angeles County Code.

a person who, at the time the injury or damage was sustained, was committing a wilful trespass . . . upon premises occupied by the owner or custodian of the dog.” (§ 10.37.170, subd. (A).)

C. *The Department Abused Its Discretion, and Further Remand Is Appropriate*

On remand from the superior court, the hearing officer appears to have determined the Smiths did not sustain their injuries either while willfully trespassing or while on property occupied by the Adamsons because the Smiths sustained their injuries while walking on Wildwood Canyon Road. Substantial evidence supported the finding the Smiths sustained their injuries on Wildwood Canyon Road. But that finding did not support the hearing officer’s determination, which rested on a pair of legal errors.

First, the hearing officer apparently concluded that the public has a right to travel on any private road, including Wildwood Canyon Road, and that therefore, as long as the Smiths were on the road, they were not trespassing.⁷ But because the public does not always have the right to travel on a private road, use of a private road by a member of the public, without the owner’s permission, may constitute a trespass. (See Veh. Code, § 490 [a “[p]rivate road or driveway” is a way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other members of the public”]; *Peebler v. Olds* (1946) 28 Cal.2d 402, 405 [affirming a determination that none of the

⁷ There is no contention that Wildwood Canyon Road is a public road or public street or anything other than a private road, i.e., a privately owned and maintained way onto private property.

roads in a cemetery was dedicated to public use, that none of the defendants had any right to use that property, and that “defendants’ threats to continue their unlawful trespass and their conduct in that respect would deprive plaintiffs” of their rights]; *Silva v. Spangler* (Cal. 1896) 5 Cal. Unrep. 277, 43 P. 617, 618 [“we fail to find any intimation that the strip of land, and the private right of way thereon, is a public highway, or that the public has any easement or right therein or thereto”]; *Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th 1489, 1501 [““Public ways, as applied to ways by land, are usually termed ‘highways’ or ‘public roads,’ and are such ways as every citizen has a right to use. [¶] A private way relates to that class of easements in which a particular person, or particular description or class of persons, have an interest or right as distinguished from the general public.””]; *Heist v. County of Colusa* (1984) 163 Cal.App.3d 841, 851 [“If there is no direct access, persons using Laux Road must trespass across private property to gain access to the Sink; as trespassers, they have no right to do so.”]; *Flavio v. McKenzie* (1963) 218 Cal.App.2d 549, 553-554 [“It may well be that a ‘private road’ may be one that is maintained by the abutting landowners, rather than by a public body, and yet be open to public use. But . . . we do not believe that it is reasonable to so interpret the term in this case.”]; *Loma Vista Inv. v. Roman Cath. Archbishop* (1958) 158 Cal.App.2d 58, 63 [“The word ‘street’ in its usual and ordinary meaning denotes a public highway; it does not include a private way.”].)

Second, the hearing officer determined the Adamsons did not occupy the property on which the Smiths sustained their injuries because the Smiths sustained their injuries on Wildwood Canyon Road. The hearing officer, like the trial court, apparently

concluded a property owner cannot possibly “occupy” that portion of his or her property that is used as a road. The law, however, is otherwise. (See *Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1092-1094 (*Vieira*) [owner of property on which one-half of a “private road” lay and who had a right-of-way easement to use the other half was an “occupant” of the road]; *Scrubby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702-703 [“Every incident of ownership not inconsistent with the easement and the enjoyment of the same is reserved to the owner of the servient estate. [Citations.] [¶] The owner of the servient estate may make continued use of the area the easement covers so long as the use does not ‘interfere unreasonably’ with the easement’s purpose.”]; cf. *Vieira*, at p. 1093 [“The beneficiary of an easement can certainly be said to occupy or possess, or not to occupy or possess, the land encumbered by the easement. Someone who exercises a right of way by driving on a road across his neighbor’s property is ‘occupying’ the road, and is at least momentarily in possession of it, while doing so. Such a person can also be found to occupy or possess the dominant estate—in this example, the land served by the right of way.”].) Thus, like the hearing officer’s conclusion the Smiths were not trespassing when they sustained their injuries, his conclusion the Adamsons did not occupy the property on which the Smiths sustained their injuries rested on legal error. (See *Department of Health Care Services v. Office of Administrative Hearings* (2016) 6 Cal.App.5th 120, 140 [““On questions of law arising in mandate proceedings, we exercise independent judgment.””].)

In light of these errors and the inconclusiveness of the findings and evidence regarding whether the Smiths sustained their injuries while willfully trespassing on property occupied by

the Adamsons, we remand the matter to allow the hearing officer to receive additional evidence on that question. (*Topanga Assn. for a Scenic Community v. County of Los Angeles*, *supra*, 11 Cal.3d at pp. 513-518; see *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 531 [“when an agency determination is set aside for insufficiency of the evidence in the administrative record, the proper course is to remand to the agency for further appropriate proceedings—presumably the agency’s consideration of additional evidence as the basis for its decision on reconsideration,” *italics omitted*]; *Carlton v. Department of Motor Vehicles* (1988) 203 Cal.App.3d 1428, 1434 [“Where an administrative decision is set aside for insufficiency of the evidence it is customary to remand the matter to the agency for a new hearing [citations] except in the rare case where as a matter of law no evidence could support the agency’s decision.”].) Evidence tending to answer the following questions will be particularly relevant.

First, were the Smiths on the Adamsons’ property when they sustained their injuries? There is no dispute in the existing record that at least some portion of Wildwood Canyon Road lies on property owned by the Adamsons. It is unclear, however, whether the Smiths sustained their injuries on that portion of the road. Michael Smith stated in his (unsigned) statement that he and his wife were “walking down a paved road past some horse stables when [they] were attacked.” Shannon Smith stated she and Michael were “taking a walk in the vicinity of the residence where the two brown pit bull mixes live.” Officer Schumann testified the dogs attacked the Smiths as they “were walking on Wildwood Canyon Road in Newhall when they passed the [Adamsons’] property at 23485 Wildwood Canyon Road.” Carrie,

using a map on her electronic tablet during her testimony, stated: “Right here (indicating). And where the attack happened, it happened right around this bend (indicating).” It is not sufficiently clear from these statements where the Smiths were when they sustained their injuries.

Second, what was the scope of any easement on the portion of Wildwood Canyon Road that lay on the Adamsons’ property? In particular, was the easement a private easement, or did it extend to the public? (See *Schmidt v. Bank of America, N.A.*, *supra*, 223 Cal.App.4th at p. 1499 [“An easement is a restricted right to specific, limited, definable use or activity upon another’s property.”]; *id.* at p. 1501 [“A private easement ordinarily vests [right-of-way] use rights in the owner of a particular parcel of neighboring property, the ‘dominant tenement.’ . . . Unlike a private easement, the use rights of a public right-of-way are vested equally in each and every member of the public.”].) If such an easement extended to the public, the Smiths were not trespassing. (See *McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1174 [““The essence of the cause of action for trespass is an ‘unauthorized entry’ onto the land of another.””].)

Testimony by Carrie and Marsha at the administrative hearing suggests that the only people with permission to walk on that portion of the road lying on the Adamsons’ property were the people who lived in the two houses immediately behind the property and that not even those neighbors living closer to the gate had such permission. When questioned at oral argument about the existence and scope of an easement to use the road, appellate counsel for Ethan asserted that the road was not open to or used by members of the public and that parcel maps showed the existence of an easement allowing ingress and egress only for

public utilities and not the general public. But the evidence in the administrative record does not support (or contradict) counsel's assertions, and the testimony by Carrie and Marsha is somewhat vague about, among other things, what portion of Wildwood Canyon Road they were describing.

Third, were the Adamsons occupants of the property on which the relevant portion of Wildwood Canyon Road lay? "Occupancy goes to the holding, possessing or residing in or on something" (*Albert v. Truck Ins. Exchange* (2018) 23 Cal.App.5th 367, 380) and does not require physical presence on the property at any particular moment (see *Vieira, supra*, 8 Cal.App.5th at p. 1094 [owner of real property occupied it because, among other considerations, he was "frequently" present]). The record indicates the Adamsons occupied at least some portion of their property because they lived and worked on it, but the location of that property in relation to the portion of Wildwood Canyon Road on which the Smiths sustained their injuries is not clear. As noted, however, the fact the Smiths received their injuries on the road is not, by itself, determinative on the issue of the Adamsons' occupancy.

D. *The Hearing Officer Should Not Have Considered the Smiths' Unsigned Statements*

At the beginning of the administrative hearing, the hearing officer indicated he would "admit all relevant evidence, including all incident reports, affidavits of witnesses," and during the hearing, the Department read the declarations of Michael and Shannon Smith into the record. Neither Smith, however, stated the declaration was under penalty of perjury. Section 10.37.110, subdivision (C) stated, in relevant part: "The judicial officer or

administrative hearing officer may admit into evidence all relevant evidence, including incident reports and the affidavits of witnesses, limit the scope of discovery, and may shorten the time to produce records or witnesses.” Although the Adamsons did not object, the hearing officer should not have considered the Smiths’ unsigned statements. (See Code Civ. Proc., § 2015.5 [witness’s sworn statement, declaration, or affidavit must be “subscribed by him or her”]; *Baron v. Mare* (1975) 47 Cal.App.3d 304, 308 [defective declaration “should not have been considered”].) On remand, the Department will have an opportunity to submit properly executed statements by the Smiths.

DISPOSITION

The judgment is reversed and remanded with directions for the trial court to remand the matter for further administrative proceedings on whether the Smiths sustained their injuries while willfully trespassing on property occupied by the Adamsons. The petition for writ of supersedeas issued on December 21, 2016 is vacated. The parties are to bear their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.